WANGSA TIMBER INDUSTRIES SDN BHD & ORS

v.

ADULFAST ANTHONY ROBERT & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: S-02-631-1995]
19 SEPTEMBER 2001

CIVIL PROCEDURE: *Appeal - Withdrawal of appeal*

This was an appeal by the appellants against the decision of the High Court dismissing their counterclaim for damages. This appeal would only require determination if the appellants succeeded in their appeal in the main suit against the High Court's decision declaring that the respondents had acquired a right of way.

Held:
Per Mokhtar Sidin JCA

[1] Since the appellants' appeal in the main suit was dismissed, they conceded that there was no basis for them to proceed with the present appeal as it hinged on the success of their appeal in the main suit.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Ini adalah rayuan perayu menentang keputusan Mahkamah Tinggi yang menolak tuntutan balas mereka untuk ganti rugi. Rayuan ini hanya memerlukan penentuan jika perayu berjaya dengan rayuan mereka di dalam guaman utama menentang keputusan Mahkamah Tinggi yang mengesahkan bahawa penentang telah memperolehi suatu hak laluan.

Diputuskan:
Oleh Mokhtar Sidin JCA

[1] Oleh kerana rayuan perayu di dalam guaman utama ditolak, mereka mengaku bahawa tiada asas bagi mereka untuk meneruskan rayuan ini kerana ia telah bergantung kepada kejayaan rayuan di dalam guaman utama.

[Rayuan ditolak.]

For the appellants - Marina Tiu; M/s Yap Chin & Tiu
For the respondents - Clement Skinner; M/s Skinner Lind Willie Wong & Chin

[Appeal from High Court, Kota Kinabalu; Suit No: K22-178-1994]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

This is an appeal by the appellants who are the defendants in the court below against the decision of the learned judge of the High Court, Kota Kinabalu who had dismissed the appellants' counterclaim for damages. The appellants' counterclaim is found in the amended statement of defence dated 5 January 1995 to Civil Suit No. K22-178 of 1994 filed by the respondents. The counterclaim stated as follows:

COUNTERCLAIM

20. The Defendant repeat paragraphs 1 to 9 of the Defence.

21. Since sometime in December 1994, the Plaintiffs' agent whose name is unknown to the Defendants until discovery herein, have caused annoyance to the Defendants' workers by habitually parking his car at the entrance to the Defendants' land thus obstructing the way into the Defendants' land and refusing to remove the said car despite requests made to him.

22. The obstruction have caused great hardship and inconvenience to the Defendants and their servant or agent in that it prevents and/or hinders the delivery of building materials to the actual building site.

23. Further, the Plaintiffs have trespassed and/or encroached (and continues to do so) into the Defendants' land in that part of their garden is sited beyond the shared boundary line into the north-eastern side of the Defendants' land.

24. Unless restrained, the Plaintiffs intend to continue their trespass or encroachment onto the Defendants' land and their obstruction of the access to the Defendants' land as aforesaid.

25. And the Defendants' counterclaim against the Plaintiffs for:

    (1) a declaration that they are entitled to the exclusive possession use and enjoyment of the Defendants' land Country Lease No. 015276409 save and except for the right of way registered under Memorial No: 87163 in the Central Land Registry, Kota Kinabalu;

(2) a further declaration that the Plaintiffs' right of way over the Defendants' land Country Lease No. 015276409 is that as stated in the registered right of way under Memorial No. 87163 and not anywhere else on the Defendants' land aforesaid;

(3) an order to compel the Plaintiffs whether by themselves their agents or servants and at their costs to cease or remove the trespass or encroachment on the Defendants' land Country Lease No. 015276409;

(4) an injunction to restrain the Plaintiffs whether by themselves or by their servants or agents or whosoever from trespassing on the Defendants' land or obstructing or impeding in any manner whatsoever the entrance or access to the Defendants' land Country Lease No. 015276409;

It is clear that the appellants' counterclaim hinges on the claim by the respondents in the main suit as to their entitlement for easement of right of way. It was made clear to us by the parties that if the respondents succeeded in their main claim for easement of right of way, then the counterclaim by the appellants is doomed to failure. The learned judge in respect of the main suit found in favour of the respondents whereby the respondents had established easement in respect of the access road. Being dissatisfied with that decision the appellants appealed to this court.

As agreed by the parties, the appeal in respect of the main suit, ie, the issue whether the respondents had acquired an easement of right of way be first determined and only in the case where the appellants succeed in their appeal in the main suit, then the issue in respect of this appeal shall be determined. In respect of the appeal in the main suit (Civil Appeal No. S-02-637-1995) we gave our decision in favour of the respondents whereby the appeal by the appellants was dismissed with costs.

When we dismissed the appeal in respect of Civil Appeal No. S-02-637-1995, Ms. Marina Tiu was kind enough to concede that there was no basis for her to proceed with the present appeal because this appeal was on the assumption that the appellants succeed in their claim for injunction and damages caused by the trespass.

In view of the concession by the learned counsel, this appeal is hereby dismissed. We are of the view that the concession by the learned counsel was well taken and that the counsel for the respondents did not press for costs, we make no order as to the costs in this court in respect of this appeal. The deposit is to be refunded to the appellants.

My learned brother, Dato' Abu Mansor Ali, who has the opportunity of reading this judgment in draft, has expressed his concurrence with this judgment.